

the latter, the charge may be imposed but should be waived if the CLEC can show the flaw to have been Verizon's fault.

#### NONRECURRING CHARGES

##### Introduction

Nonrecurring costs (NRCs; the abbreviation refers as well to the nonrecurring charges intended to recover those costs) have been defined by Verizon as "one-time costs that are incurred in responding to a carrier's request for the initiation, change, or disconnection of service."<sup>215</sup> To state the matter most generally, the costs are determined by estimating the worktimes needed to perform the required activities and multiplying them by the appropriate labor rates. NRCs have been a nettlesome issue since Phase 2 of the First Proceeding and continue to be controversial here. The issues are both complex and important, inasmuch as CLECs regard NRCs as upfront impediments to market entry.

In Phase 2 of the First Proceeding, we found that Verizon had failed to meet its burden of proof with regard to NRCs and that the record could have justified rejecting its NRC presentation in toto. Doing so, however, would have been tantamount to finding that the costs at issue were zero, clearly an incorrect conclusion, and we therefore set reasonable placeholder NRCs at a level approximately 57% below Verizon's proposals.<sup>216</sup> Verizon's failures of proof related to both the forward-looking nature of its study and its method for estimating worktimes.

In Phase 3, Verizon proposed additional NRCs. We found that Verizon's estimating methods had been improved in some respects, and we approved several of the new NRCs. We rejected others, as to which the new estimating method had not

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<sup>215</sup> Verizon's Initial Brief, p. 288.

<sup>216</sup> The basis for the 57% adjustment is set forth in the Phase 2 Opinion, pp. 53-54; in general, the adjustment represented the average effect of applying, in each work function for which Verizon had conducted a task oriented costing (TOC) analysis, the minimum rather than the mean TOC data point.

been applied. We also strengthened the procedure used to ensure that NRCs did not double recover costs already recovered through carrying charge factors.

In the present proceeding, Verizon claims to have presented studies designed to satisfy the earlier criticisms. Most of the studies were based on the nonrecurring cost model (NRCM); of the nine studies that did not rely on the NRCM, none is specifically controverted.<sup>217</sup>

The Judge described Verizon's study in some detail<sup>218</sup>; in general Verizon first determined worktimes using today's method of operations and then adjusted those results to reflect the effects of planned mechanization efforts. It therefore contended that the study was forward-looking, resulting in NRCs that often are substantially less than current costs, but it explained further that some activities will continue to require manual rather than mechanized work effort.

Noting the improvement in Verizon's NRC studies between Phase 2 and Phase 3 of the First Proceeding, the Judge found that Verizon's efforts to study its NRCs on a forward looking basis had been still further improved. He did not regard the studies as fatally flawed by their use of existing systems and costs as a starting point, holding that "the key is whether adequate steps have been taken to adjust that starting point to reflect reasonable forward-looking assumptions. Verizon's evidence details those steps, and they appear generally sufficient."<sup>219</sup> To the extent, however, that NRCs reflected continued use of UDLC technology, the Judge recommended that, like the corresponding recurring charges, they be set on that basis for now but they be reduced in a year to a level consistent with IDLC alone unless Verizon can show that step to be unreasonable.

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<sup>217</sup> Verizon's Initial Brief, p. 289, n. 689, listing the nine non-NRCM studies.

<sup>218</sup> R.D., pp. 176-177.

<sup>219</sup> R.D., p. 181.

AT&T excepts to the Judge's general endorsement of Verizon's NRC studies and Verizon excepts to a number of specific adjustments related to NRCs for DSL service.

#### The Studies in General

Noting the substantial burden cumulatively imposed by NRCs on Verizon's competitors, AT&T argues that Verizon's current NRC submission suffers from the same principal flaw--its reliance on Verizon's existing embedded network--as the submission found unacceptable in Phase 2. According to AT&T, the adjustments made by Verizon in contemplation of planned network upgrades failed to reflect the TELRIC network that underlies its proposed recurring costs. As a result, AT&T contends, NRCs and recurring costs are based on fundamentally different network assumptions, something that TELRIC does not allow. AT&T therefore urges us to find that Verizon has again failed to sustain its burden of proof and to reject the proposed NRCs entirely; should we be reluctant to take that radical a step, AT&T would propose a disallowance of 40%.

Verizon responds that AT&T is merely reiterating arguments fully considered and rejected by the Judge and that his recommendation reflects a careful consideration of the evidence. It characterizes the proposal to reduce the costs by 40% as unlawful and unfair, noting that AT&T presented no affirmative case on NRCs, having offered only a critique of Verizon's studies that was refuted on rebuttal.

AT&T exception is denied. The Judge fully recounted both the history of the issue in the earlier proceeding and the basis on which he found Verizon's current studies to be generally acceptable. AT&T's arguments on exceptions offer nothing new on the point.

#### OSS Efficiency (Fallout Rate)

The fallout rate refers to the percentage of CLEC orders that cannot be processed electronically and that require more costly manual intervention. AT&T asserted that Verizon's study contemplated excessive fallout rates, as high as 25%--a

figure AT&T says it calculated for a 2-wire loop--and that in a properly designed system, the fallout rate should not exceed 2%. The CLEC Alliance noted that the 2% figure had been adopted in proceedings in Connecticut and Massachusetts; AT&T asserted that the record relied on in Massachusetts was similar to the one before us.

The Judge found that Verizon had not borne its burden of proving that its fallout rate was adequately optimistic. Noting that "fallout rates can be expected to decline as experience is gained with more efficient OSS, and [that] it is important that rates here be set on the premise of minimal fallout," he recommended adoption of the 2% fallout rate advocated by AT&T.<sup>220</sup>

Verizon excepts, arguing that there is no record basis for applying an across-the-board 2% fallout rate. It agrees that "minimal" fallout should be assumed but insists its studies do just that, using different levels of fallout, estimated by its experts, for different types of activities. Contending that AT&T offered no evidentiary support for the 2% figure, it suggests that AT&T was relying on a Southwestern Bell Telephone experience it had cited in other proceedings. That experience, in Verizon's view, is distinguishable, inasmuch as it pertained only to the service order function of simple residential retail service, which cannot be extended to other service categories.

AT&T replies that it in fact offered extensive testimony criticizing Verizon's fallout rates, including the testimony of a knowledgeable witness; it contends Verizon is again alleging "no evidence" when it means "evidence that it considers to be in one way or another insufficient." AT&T adds that the Southwestern Bell experience is a strawman set up by Verizon in its exception, for it had not been referred to by the Judge. The Judge referred, instead, to a Massachusetts decision that had been extensively quoted from in AT&T's reply brief and that Verizon's exception ignores.

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<sup>220</sup> R.D., p. 184.

Verizon contends as well that whether or not the 2% fallout rate is valid, the calculations accompanying the recommended decision applied it incorrectly in one instance, inasmuch as the software translation needed to connect a new UNE-P port and loop would always have to be performed manually. Verizon asserts that no party offered any evidence challenging that claim but that the calculations accompanying the recommended decision nevertheless reflect application of the 2% fallout rate to that activity. Even if the rate is generally adopted, it argues, it should not be applied here.

AT&T responds that Verizon again misrepresents the record, citing testimony by its witness that if a forward looking network construct and forward looking OSSs are assumed, no manual software translation would be needed to connect the new UNE-P port and loop.<sup>221</sup> Accordingly, AT&T contends, the adjustment was properly applied to that activity.

As AT&T points out, the Judge had ample record basis for his 2% fallout rate, and Verizon's general exception here is denied. Verizon's specific exception related to new UNE-P ports, however, is granted; manual software translation is indeed needed in connection with a new UNE-P installation, and AT&T has not shown the contrary.

#### Loop Conditioning NRCs

Rhythms/Covad contended that Verizon's study overstated the worktimes used in calculating NRCs. In particular, they questioned Verizon's assumption that loop conditioning work must proceed one loop at a time instead of through what it regarded as the more efficient process of deloading multiple loops, and they urged use of the time estimates proposed by their witnesses. Verizon contended that a proper analysis of multiple loop conditioning showed that it would pose service problems and significantly increase costs.

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<sup>221</sup> AT&T's Reply Brief on Exceptions, p. 101, citing Tr. 1,573-1,578 and Exhibit 316.

The Judge found the record inconclusive in a variety of ways and treated the loop conditioning NRC as follows:

Deloading loops in batches of 25 or 50 may risk degrading service or increasing costs in the manner warned of by Verizon; but deloading only one loop at a time does not appear absolutely essential to system integrity or cost minimization, and might itself jeopardize system integrity by requiring more frequent opening of enclosures.<sup>222</sup>

To state the matter differently, Verizon has not borne its burden of proof with respect to its proposed charges, but it has shown ample qualitative reason why the charges should not be reduced to a level consistent with the worktimes advanced by Rhythms/Covad. To reflect the state of the record before me, I conclude that Verizon should recompute its worktimes on the premise that loops are deloaded on average in batches of ten, thereby capturing some of the efficiencies that may be available through multiple deloadings while recognizing the difficulty of extending that premise too far.<sup>223</sup>

Verizon excepts, arguing that it conclusively refuted Rhythms/Covad's 25- or 50-loop proposal and that the Judge's 10-loop proposal poses, to a somewhat lesser extent, the same difficulties and lacks any basis in the record. According to Verizon, multiple deloadings could degrade or cause a loss of service and would generate additional costs to reload loops in the event they were not used for DSL service and were rededicated to voice grade service. Verizon points as well to what it characterizes as unrefuted evidence that, for a variety of technical reasons, there would be only few instances in which

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<sup>222</sup> Without intending to belittle concerns about service quality, I cannot help but note that such warnings have a long history of overstatement, going all the way back to pre-divestiture AT&T's objections to competitive customer premises equipment. (Footnote in R.D.)

<sup>223</sup> R.D., pp. 188-189 (footnote omitted).

multiple deloadings could be performed, and it contends that while the evidence was directed toward the proposed 25- or 50-pair deloading, it applies as well to the Judge's 10-loop proposal. A 10-loop premise, accordingly, requires assuming unachievable economies of scale and produces rates far below cost. Verizon contends further that the Judge ignored its arguments that rates premised on multiple deloadings pose troublesome cost recovery and rate design issues, given that customers typically do not request loops in multiples of ten. Finally, Verizon contends that despite his claim not to have belittled concerns about service quality in invoking pre-divestiture AT&T's objections to competitive customer premises equipment, the Judge did in fact do just that, discounting Verizon's specific testimony on the service quality problems posed by multiple deloadings.

In response, Rhythms/Covad dispute Verizon's claim that its evidence was unrefuted and suggest the Judge chose a middle ground that reflected his assessment of the relative strengths of the opposing bodies of evidence. They review the testimony of their witnesses explaining how multiple loop conditioning could be accomplished, noting that Verizon did not cross-examine these witnesses. They contend that their witnesses' testimony established, among other things, that multiple loop conditioning is consistent with modern cable splicing technology and that single-loop conditioning can degrade service by causing wire insulation to deteriorate.

The Judge fully explained how he reached his conclusion on the basis of the record as a whole, and while Verizon's arguments on exceptions urge a different reading of that record, they do not require it. Verizon may be correct to argue that, in many instances, it will have to condition one loop at a time, but there will likely be instances--such as multiple occupancy residential buildings--in which more than 10 loops may be conditioned at once. The 10-loop premise balances those factors as well, and Verizon's exception is denied.

DUCTS AND CONDUITS

Introduction, Background, and Legal Context

Ducts and conduits differ from nearly all of the other products considered in Module 3 of this proceeding in that they are not classified as UNEs pursuant to the 1996 Act and are not required by federal law to be priced in accordance with TELRIC. Indeed, the FCC method for pricing ducts and conduits (which is not binding on the states) is based on historical costs, and CTTANY urged its use. Verizon, in contrast, urged that conduit rentals, like UNE rates, be set on a forward-looking TELRIC basis, a proposal that would increase the rates very substantially from their present levels, set in 1970 on the basis of historical costs. The Judge provided a detailed description of the background and legal context for duct and conduit pricing<sup>224</sup>; for convenience, we note here the following highlights:

- The federal statute grants the FCC authority over rates for pole attachments (defined to include ducts and conduits), but exempts from that authority any case in which a state regulates pole attachments and certifies to the FCC that it does so in a manner that "consider[s] the interests of the subscribers of the services offered via [the pole] attachments as well as the interests of the consumers of the utility services."<sup>225</sup> New York has so certified.
- The FCC has several times determined that rates for pole attachments, ducts and conduits should be set on the basis of the utility's historical costs. It did so most recently in the "Reconsideration Order" issued in May 2001.<sup>226</sup>

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<sup>224</sup> Supplemental R.D., pp. 2-5.

<sup>225</sup> 47 U.S.C. §224(c)(2)(B).

<sup>226</sup> Amendment of Rules and Policies Governing Pole Attachments and Implementation of §703(e) of the Telecommunications Act of 1996, CS Dockets No. 97-98 and 97-151, Consolidated Partial Order on Reconsideration (rel. May 25, 2001) (the Reconsideration Order).

- Section 119-a of the Public Service Law, enacted in 1978, grants us authority over rates for pole attachments and use of ducts and conduits and specifies certain guidelines to be followed in setting those rates.
- In our 1997 "Pole Attachment Opinion," we determined that we should exercise our authority over pole attachment rates by adopting the FCC's historical cost method. In so doing, we noted the need for "cooperative federalism" and the usefulness of avoiding unnecessary variation in regulatory requirements, all for the purpose of bringing customers the benefits available from the development of competitive markets.<sup>227</sup>
- Verizon argued, in connection with the proposed inclusion of duct and conduit pricing in Phase 3 of the First Elements Proceeding, that our adoption of the FCC's method for pole attachment pricing applied to ducts and conduits as well. It attributes its change of position since then to its "comprehensive review and re-evaluation of costing and pricing issues" in the present proceeding.<sup>228</sup>

More specifically, Verizon asserted that its current rate of 75¢ per foot per year is grossly understated, inasmuch as it was set in 1970 on the basis of even earlier costs and has not been changed since; it noted that the rate was far below the corresponding rates in other states within its footprint. Verizon proposed a forward-looking costing method that takes account of the current cost of construction for new conduit systems. The rates resulting from Verizon's study (and the current rates for comparison purposes) are as follows:

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<sup>227</sup> Case 95-C-0341, Pole Attachment Issues, Opinion No. 97-10 (issued June 17, 2001).

<sup>228</sup> Verizon's Initial Brief, p. 219, n. 501.

Proposed	Conduit Rates (per duct-foot)		
	Current	Verizon	Verizon
	Rate	Proposed	
	(Statewide)	Major Cities <sup>229</sup>	Rest-of-State
Main Conduit <sup>230</sup>	\$0.75	\$6.22	\$5.41
Subsidiary Conduit	\$1.40	\$9.49	\$7.68

CTTANY's analysis, based on the FCC's historical cost method, began with publicly available ARMIS data on embedded costs, used those data to calculate a net investment figure, and divided that figure by total system length to arrive at the net linear cost of conduit. In calculating net linear cost, it relied not on ARMIS data, which it regarded as unreliable, but on information available from Verizon's continuing property records (CPR); that controversial step is discussed in greater detail below. On the basis of its analysis, CTTANY calculated a maximum rate per foot of 80¢.

The Judge determined, for reasons described below, that ducts and conduits should be priced on the basis of the FCC's method, as CTTANY urged, but without application of CTTANY's adjustment reflecting the use of CPR data. On that basis, he calculated a per-foot cost of \$1.50 per duct-foot. Verizon excepts to the rejection of its forward-looking costing method and to the Judge's further recommendation that rates be set, in some situations, on the basis of a CLEC's use of less

<sup>229</sup> Verizon's study did not include Manhattan (or the Bronx), where ducts and conduits are owned not by Verizon but by its wholly-owned subsidiary, Empire City Subway, Limited. Empire City Subway, which offers conduit space to Verizon and other carriers on a nondiscriminatory basis, is regulated by the New York City Department of Information Technology and Telecommunications.

<sup>230</sup> "Main conduit" refers to a bank of conduit that directly connects two manholes or a central office vault and a manhole, along with certain associated equipment. Subsidiary conduit refers to conduit extending from manholes to poles or buildings (other than central office buildings) that is needed to extend underground cables to connections with either aerial or block cables.

than one-half of a duct. CTTANY excepts to the Judge's rejection of its CPR-based adjustment.<sup>231</sup>

#### Historical vs. Forward-Looking Costs

After describing the parties' arguments at some length<sup>232</sup> the Judge recommended use of the FCC's historical-cost method for setting duct and conduit prices. He agreed with Verizon that we were not bound by the FCC's method and that PSL §119(a) need not be read to require basing prices on historical costs, but he rejected Verizon's policy arguments in support of forward-looking pricing. He reasoned as follows:

Essentially, Verizon insists on the need for consistency between the pricing of conduit rentals on the one hand and of UNEs on the other. But the FCC, the author of TELRIC pricing for UNEs, appears to see no need for that consistency, having very recently reaffirmed historical-cost-based pricing of poles and conduits; and this Commission, as a matter of discretion, has deferred to the FCC in this regard, at least with respect to pole attachments. I see no reason why conduits, whose function is analogous so that of poles, should be treated any differently from them, and the Commission's decision in Opinion No. 97-10 seems controlling here. That, indeed, was Verizon's own position in the First Elements Proceeding, and its attribution of its changed position only to its "comprehensive review and re-evaluation of costing and pricing issues" inevitably suggests a degree of result orientation.

Beyond that, it does not appear that forward-looking duct and conduit technology

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<sup>231</sup> The Judge resolved a number of additional issues that are not pursued further by the parties on exceptions and, in general, are not discussed further here. Of these, we note only the Judge's rejection, on various legal grounds, of CTTANY's proposal that we assume jurisdiction over the rates charged by Empire City Subway. The Judge's treatment of the issue is consistent with precedent and law and we explicitly affirm it.

<sup>232</sup> Supplemental R.D., pp. 8-13.

differs all that much from historical. In contrast to the UNE situation, this is not a case where TELRIC pricing is needed to avoid imposing on CLECs the costs associated with the incumbent's embedded plant (and embedded inefficiencies). Verizon's plea for consistency between UNE pricing and duct and conduit pricing fails to take account of the differences between the two products.

Accordingly, I see no basis for recommending what would be, in effect, a reversal of Commission precedent. Consistent with the Commission's earlier determination with respect to pole attachments, rates for duct and conduit rentals should be set, following the FCC's method, on the basis of historical costs.<sup>233</sup>

On exceptions, Verizon stresses the gap between the Judge's recommended rate of \$1.50 per duct-foot per year and its calculated forward-looking costs ranging from \$5.41 to \$16.56. Arguing that consistency and fairness require pricing ducts and conduits on the basis of TELRIC as long UNEs are priced on that basis, Verizon suggests that departing from TELRIC in the one instance where it produces higher rates "would sacrifice principled decision-making to blatant result orientation, and would highlight the uncompensated taking effected in this proceeding."<sup>234</sup>

In addition to being demanded by fairness, Verizon argues, consistent pricing for stand-alone conduit<sup>235</sup> and for loops is required by economic logic, for only if prices are consistent will CLECs make economically efficient choices

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<sup>233</sup> Supplemental R.D., pp. 14-15.

<sup>234</sup> Verizon's Brief on Exceptions, p. 2. (Unless otherwise specified, citations in this section of the order are to the briefs and reply briefs on exceptions to the supplemental recommended decision.)

<sup>235</sup> Stand-alone conduit, at issue here, is conduit offered by Verizon as a product to CLECs that wish to run their own cable through it. Conduit is also included as part of the supporting structure for loop and transport plant, in which event its costs are recovered through the appropriate UNE rates.

between buying unbundled loops from Verizon and deploying their own loop plant in Verizon's conduit. The Judge noted that the FCC appeared to see no need for that consistency; Verizon suggests the FCC did not consider the question. Verizon adds that forward-looking pricing would permit us to deaverage conduit rates on the same geographic basis as loops and to set separate rates for main and subsidiary conduit, refinements not available under the FCC's method and that might work to the CLECs' advantage inasmuch as subsidiary conduit costs are higher but, according to CTTANY, its constituents for the most part use main conduit.

Asserting that the Judge relied primarily on the Pole Attachment Opinion in recommending use of the FCC method, Verizon argues against "blind adherence to precedent."<sup>236</sup> It contends the earlier decision was directed only to poles and not to conduit and that we recognized the potential distinction in requiring Verizon to submit forward-looking cost studies for consideration here; just as the Phase 1 UNE rates are up for reexamination here, it adds, so should we reexamine the contemporaneous decision regarding poles. In its view, the perceived need for consistency and "cooperative federalism" that we cited in choosing the FCC method for poles should not be decisive here, inasmuch as rates set in various states on the basis of the FCC formula would not necessarily be uniform and any such uniformity that might be achieved would be at the expense of the more important uniformity between conduit and loop rates: "Unbundled loops and stand-alone conduit are, to some extent, economic substitutes for each other. Conduit in New York and conduit in New Jersey are not substitutable in this fashion."<sup>237</sup> Verizon acknowledges that it took an opposite view on this issue in 1998 but regards as unwarranted the Judge's suggestion that its change of position "inevitably suggests a degree of result orientation"; it cites, rather, the cogency of

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<sup>236</sup> Verizon's Brief on Exceptions, p. 5.

<sup>237</sup> Id., p. 7.

the arguments now presented in favor of consistent costing methods.

Finally, Verizon reiterates its effort to refute, point-by-point, the FCC's reasoning in support of its decision to price conduit on the basis of historical costs. The arguments were presented to the Judge and summarized by him as follows:

- The FCC cited stability and simplicity in support of maintaining the status quo; Verizon sees no reason to exempt conduit from the rate changes contemplated in this proceeding and sees no reason for simplicity to be a decisive consideration.
- The FCC noted the complicated procedures that would be needed to develop a new, forward-looking ratemaking formula; Verizon points out that this proceeding has already done so.
- The FCC held that the advantages of forward-looking pricing were likely to be less pronounced in the pole attachment context; Verizon regards that contention as baseless, arguing that even though conduit facilities are not built or replaced on a unit-by-unit, as-needed basis, new conduit does need to be built as demand expands.
- The FCC noted the absence of any congressional directive to deviate from the use of historical costs; Verizon reiterates its point that the FCC's regulations are not binding here.
- The FCC noted that its notice has not specifically raised the possibility of moving to forward-looking costing; Verizon notes that this procedural objection likewise is inapplicable here.<sup>238</sup>

In sum, Verizon argues that neither precedent nor policy warrants doing anything other than exercising our discretion to

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<sup>238</sup> Supplemental R.D., pp. 8-9.

price ducts and conduits on a TELRIC basis as long as UNEs are so priced.

If Verizon in its exception points to the small increase recommended by the Judge over the rates set in 1970, CTTANY in reply emphasizes the very large percentage increase now sought by Verizon--between 621% and 729% for main conduit and between 449% and 1,083% for subsidiary conduit. In support of its position that historical cost pricing should be retained, it argues, first, that forward-looking costs are not a proper basis for conduit pricing. It contends, in this regard, that Verizon constructs conduit for its own use and rents only excess capacity to cable operators; that Verizon is reimbursed through make-ready charges for the cost of modifying existing plant to accommodate additional facilities; that conduit plant is nowhere near exhaustion; that conduit differs from UNEs in that its technology is relatively static; and that forward-looking pricing is not needed to provide consistent price signals inasmuch as cable operators already occupy the conduit and will not abandon their facilities-based service in favor of leased UNE arrangements. It disputes Verizon's suggestion that geographical deaveraging would produce more favorable rates, and it denies Verizon's claim that there is no need for interstate consistency, arguing that investment decisions are based on characteristics of the geographic market and that we recognized, in the Pole Attachment Opinion, that investment in New York would be promoted by reduced barriers to competition.

CTTANY points as well to our Staff's informal rejection, over the years, of Verizon's arguments that forward-looking pricing was consistent with PSL §119(a),<sup>239</sup> and it contends that the thoroughly litigated factors that led us to adopt the FCC's method for pricing poles in 1997 remain equally valid today. It notes the FCC'S recent reaffirmance of its

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<sup>239</sup> The Judge held that §119-a "need not be read to require basing prices on historical costs." (Supplemental R.D., p. 14.) We need not reach that issue, inasmuch as we are deciding, on other grounds, to base prices on historical costs.

position and its explanation there of the differences between poles and conduits on the one hand and UNEs on the other.<sup>240</sup> CTTANY asserts as well that Verizon ignores the substantial body of law regulating poles and conduits as essential facilities and rejecting the use of forward-looking costing; and it says that Ameritech, a similarly situated incumbent LEC, recently proposed pricing based on historical costs in an Illinois proceeding.

RCN, in its late filed reply, argues to similar effect, pointing to the distinctions drawn by the FCC between poles and conduits on the one hand and UNEs on the other. It adds that TELRIC is intended to produce prices that are lower than those based on historical costs--a point it says Verizon itself makes in its brief to the Supreme Court in the TELRIC litigation--and that the FCC chose that policy "to foster competition by easing the financial impact of entering a marketplace that a monopoly provider controls and manipulates."<sup>241</sup> Verizon's pricing plan, which would dramatically increase existing duct and conduit rates, would have just the opposite effect. RCN points as well to the importance of following precedent, and it sees no public interest rationale for deviating from the policy of cooperative federalism we adopted with regard to pole rentals.

The arguments on exceptions add little to the thorough airing this issue received before the Judge, and we are satisfied that he properly resolved it. Verizon's exception is denied not out of "blind adherence" to precedent but because the precedent was sound when adopted; remains so now (as the FCC, too, recently held yet again); and deserves to be extended to ducts and conduits, which have more in common with pole attachments than with UNEs.

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<sup>240</sup> It cites the FCC's Reconsideration Order, ¶¶15-25.

<sup>241</sup> RCN's Reply Brief on Exceptions, p. 3, citing Local Competition Order ¶¶705-706.

Use of CPR Data Rather Than ARMIS

In applying the FCC's method, CTTANY used certain data from Verizon's continuing property record, rather than the ARMIS data on which Verizon relied, to determine the number of duct-feet over which net conduit investment should be spread. Verizon objected to CTTANY's recourse to those data and to the manner in which it had used them. The Judge agreed with Verizon, and CTTANY excepts.

The Judge set forth the full background for the issue.<sup>242</sup> Briefly, it should be understood that conduits are structures that provide physical protection for cables. They may consist of one or more ducts, which actually carry the cables. The term "duct-feet" refers to the total length of duct work in the network, while "trench-feet" or "conduit-feet" refers to the total length of the trenches in which the conduit is buried. The relationship between conduit-feet and duct-feet depends on the average number of ducts buried in each trench.

On the basis of ARMIS data, Verizon calculated a total of 265.5 million duct-feet in its network. That figure, together with a net conduit investment of about \$903 million, produced a net investment per duct-foot of about \$3.40. But ARMIS data showed a duct-to-conduit ratio of 3.8, which CTTANY saw as out of line with the average ratio of 5.74 in the remainder of the former Bell Atlantic footprint. It therefore turned to Verizon's continuing property record, a detailed physical inventory system that CTTANY regarded as more accurate; it noted that the FCC method generally relied on publicly available reports such as ARMIS but permitted use of more accurate data when available. CPR data showed the average number of ducts per main conduit to be 7.91, which CTTANY reduced to 7.21 ducts per conduit to recognize that subsidiary conduit usually held only two ducts. It calculated that adjustment by taking account of the ratio of main to subsidiary duct derived from Verizon's CPR.

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<sup>242</sup> Supplemental R.D., pp. 17-18.

On that basis, CTTANY computed a higher number of duct-feet and a consequently lower investment per duct-foot. After describing the parties' arguments in detail,<sup>243</sup> the Judge found CTTANY's adjustment flawed:

Verizon's challenge to CTTANY's adjustment is persuasive. In effect, CTTANY is double-counting the greater number of ducts in main conduit: once to determine the weighting to be afforded main conduit and once to determine the number of ducts to which the weighting is to be applied. The proper weighting would be on the basis of main and subsidiary trench-feet, and that weighting would then be applied to the larger number of ducts in main conduit, thereby recognizing that larger number only once. As Verizon has shown, that correct weighting produces, as would be expected, a cost per duct-foot identical to the one produced by simply dividing net investment by the number of duct-feet. Accordingly, I recommend that the rate be set on the basis of the FCC method, using a cost per duct-foot calculated by dividing net investment by the number of duct-feet shown in the ARMIS data, and without reference to the CPR data.<sup>244</sup>

On exceptions, CTTANY maintains that the Judge rejected the best evidence of the number of ducts per conduit, relying, instead, on a questionable number derived from the ARMIS data. It argues that, in an analogous context, pole attachment rates take account of the usable space on poles, something that may be determined from CPR data. CTTANY goes on to reiterate its comparison of the ARMIS-based figure of 3.8 ducts per conduit in New York with the 5.74 ducts per conduit average; asserts that Verizon has provided no evidence to explain the discrepancy; and notes that most of the other states within the Verizon footprint have ratios that cluster around the mean. It contends as well that Verizon's critique of CTTANY's weighting of main and subsidiary conduit implies the impossible

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<sup>243</sup> Supplemental R.D., pp. 19-20.

<sup>244</sup> Supplemental R.D., p.21.

result that subsidiary conduit has less than one duct. CTTANY goes on to argue the inherent accuracy of CPR data, noting that even though it uses 1994 plant data, the plant is long-lived and its physical characteristics are not like to have changed. CTTANY charges that Verizon mischaracterized its calculations and adheres to ARMIS data demonstrated to be inaccurate; and it criticizes the Judge for accepting the ARMIS data "rather than drawing a negative inference from Verizon's stonewalling, and its insistence on using a figure that cannot be correct."<sup>245</sup>

Verizon responds that the issue to be determined is the cost of conduit investment per duct-foot and that the average number of ducts per conduit is irrelevant to that issue. The needed answer can be obtained directly by dividing total net investment by total duct-footage, and the latter figure can be obtained easily from ARMIS. The figure can be obtained from CPR data as well, and the CPR duct-footages are consistent with the ARMIS duct-footages. The ARMIS data, however, are more current. Rather than use this direct approach, Verizon argues, CTTANY used an indirect approach that first calculates net investment per trench-foot and then converts that figure into an investment per duct-foot. Verizon reiterates its efforts to show the fallacies in CTTANY's calculations, adding an explanation of the artifact, noted by CTTANY on exceptions, of less than one duct in subsidiary conduit. But Verizon sees no need even to consider that indirect approach and the complexities it entails, given the ready availability of the direct analysis.

The Judge fully explained his finding that CTTANY's analysis was flawed, and nothing in CTTANY's brief on exceptions rehabilitates the analysis. Verizon properly notes that the exercise here is a simple one--dividing conduit investment by the total number of duct-feet--and that the number of duct-feet suggested by ARMIS data and the number of duct-feet suggested by CPR data are not very different. Why the number of ducts per conduit in New York appears to be below the footprint average has not been conclusively explained, but Verizon has identified

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<sup>245</sup> CTTANY's Brief on Exceptions, p. 8.

a number of factors that may account for it. More importantly, the ratio is not really germane to the exercise at hand, and there is in any event no basis for replacing it with a ratio that is almost as far above the average as it itself is below. CTTANY's exception is denied.

#### Half-Duct Presumption

To facilitate calculation of a rate reflecting the percentage of conduit capacity occupied by an attachment, the FCC adopted, and reaffirmed in the Reconsideration Order, a rebuttable presumption that the attacher occupies one-half of a duct.<sup>246</sup> Unless the presumption is rebutted, the attacher is charged a rate based on one-half of the calculated cost per duct-foot. The FCC added that "when the actual percentage of capacity occupied is known, it can and should be used instead of the one half duct presumption," and that "the presence of inner duct is adequate rebuttal. Where inner duct is installed, either by the attacher or in a previous installation, the maximum rate will be reduced in proportion to the fraction of the duct occupied. That fraction will be one divided by the actual number of inner ducts in the duct."<sup>247</sup>

In light of those provisions, CTTANY presented rates for a full duct, a half duct, one-third of a duct, and one-quarter of a duct, to be applied depending on the number of inner ducts installed. Verizon objected, contending that the half-duct premise should be applied inasmuch as "Verizon would not, except in extraordinary circumstances, occupy the same duct as a CLEC."<sup>248</sup> In its own study, Verizon calculated rates for a whole duct and a half duct only, and it considered that a reasonable compromise between its interests and the CLEC's. CTTANY contended, however, that where inner duct is used, the attacher typically occupies less than half of the duct and that the FCC's

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<sup>246</sup> Reconsideration Order, ¶¶95-98 and history there cited.

<sup>247</sup> Reconsideration Order, ¶98.

<sup>248</sup> Verizon's Reply Brief, p. 120, citing Tr. 5,756-5,757.

provision for rebutting the half-duct presumption recognizes that reality.

The Judge found no reason to question the FCC's premise that the presence of inner duct rebuts the presumption that the attacher occupies half a duct, and he therefore recommended adoption of CTTANY's proposal to develop rates that assign a correspondingly lower proportion of the total cost to the attacher and to set the rate on the basis of the number of inner ducts present. Verizon excepts.

Verizon argues, first, that developing different rates for different fractional occupancies would be difficult administratively and would impose additional costs, such as those related to inventories of inner ducts. Moreover, it regards fractional rates as unnecessary to insure fair cost allocation, given that it rarely occupies the same duct as a CLEC and that a CLEC occupying an inner duct in effect uses the entire duct. As a practical matter, moreover, its standard practices limit the number of inner ducts to two or three, and the placement of more than three ducts will be even rarer in the future, as cable sizes are increased to include larger numbers of fibers. The two-inner-duct case is covered by Verizon's half-duct proposal, and where three inner ducts are present, one of those ducts would be a maintenance spare, the cost of which should be shared by the occupiers of the duct.

In response, CTTANY cites testimony by Verizon to the effect that modern conduit construction allows for placement of three or four inner ducts, and it points out that even though Verizon may choose not to share a duct with a CLEC, it retains custody over the inner ducts and has the option to lease them to other attachers. It sees no basis for Verizon's administrative objections, asserting that where the number of inner ducts cannot be determined, the FCC formula uses the half-duct rate. Finally, CTTANY characterizes as "ludicrous"<sup>249</sup> Verizon's argument that one inner duct should be excluded from consideration as a maintenance spare, seeing no evidentiary support for such

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<sup>249</sup> CTTANY's Reply Brief on Exceptions, p. 12.

treatment. In any event, it says, the FCC took the view that even a spare constitutes part of conduit capacity.

Verizon's objection raises no theoretical arguments not presented to and rejected by the Judge. Its novel arguments are that rates for fractions of a duct less than one-half are unnecessary and administratively burdensome. But administrative burden is unproven, particularly if the half-duct presumption prevails in the event the number of inner ducts cannot be determined. And if the rate turns out to be unnecessary, it will simply not be imposed. The Judge reasonably followed the FCC's premise that the presence of inner duct rebuts the presumption of half-duct occupancy, and Verizon's exception is denied.<sup>250</sup>

#### OTHER ISSUES

##### UCRCC

The unbundled CLEC reciprocal compensation charge (UCRCC) is intended to compensate Verizon in situations where it receives certain types of calls from the CLEC for hand off to a second CLEC and must make reciprocal compensation payments to that second CLEC. Verizon calculated the charge on the basis of average actual payments over the period September 1999 through December 1999, and the Judge directed it to recalculate the rate in its brief on exceptions on the basis of a longer sample period terminating more recently. Verizon provides the updated data and a revised rate in its brief; the rate is lower than that initially calculated.

AT&T requests in response that we direct Verizon to update the UCRCC data and rate on a quarterly basis, inasmuch as these payments likely will continue to decline. WorldCom argues

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<sup>250</sup> In its reply brief on exceptions, CTTANY asks us to "accept the RD's decision to adopt the FCC half-duct presumption." (CTTANY's Reply Brief on Exceptions, p. 12.) For the sake of clarity, it should be noted that the half-duct presumption was not challenged by Verizon; its exception related to the Judge's recommendation of the FCCs further point, that the presence of inner duct sufficed to rebut the half-duct presumption and warrant application of a smaller fraction.

that even the recalculated rate is inconsistent with TELRIC, inasmuch as it reflects historical experience instead of being derived on the basis of new TELRIC-based transport and switching rates. It urges that the UCRCC be set equal to Verizon's tariffed reciprocal compensation rates that result from this proceeding; to do otherwise, it argues, would allow Verizon to recover from the originating CLEC more than it would pay to the terminating CLEC for carrying the traffic.

AT&T's request that this rate be updated quarterly is something Verizon has already agreed to,<sup>251</sup> and it seems warranted in view of the ongoing changes in these figures. It is adopted. WorldCom's proposal to change the nature of this charge raises concerns that may be reasonable but is offered for the first time in its reply brief on exceptions. Parties may comment on it within 30 days of the date of this order, and we will then determine whether to pursue the matter further.

#### OS/DA Rate

Verizon notes that the Judge accepted its proposal for pricing operator services/directory assistance, which is not a UNE, on a flexible basis using TELRIC costs as the lower bound and a market based rate at the upper bound. The rate appendix to the recommended decision, however, provides only an adjusted TELRIC rate, and Verizon therefore asks for clarification that its proposal is approved. We provide that clarification, which is opposed by no party.

#### The Commission orders:

1. To the extent they are consistent with this order, the recommended decision and supplemental recommended decision of Administrative Law Judge Joel A. Linsider, issued May 16, 2001 and June 18, 2001, respectively, are adopted as part of this order. Except as here granted, all exceptions to those recommended decisions are denied.

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<sup>251</sup> Verizon's Initial Brief, p. 274.

2. Within 20 days of the date of this order, Verizon New York Inc. (Verizon) shall file tariff amendments consistent with this order. Upon filing those tariff amendments, Verizon shall serve copies on all active parties to this proceeding. Any party wishing to comment on the tariff amendments may do so by submitting 10 copies of its comments to the Secretary within 15 days of the date the amendments are filed. The tariff amendments shall not take effect on a permanent basis until approved by the Commission but shall be put into effect on a temporary basis on ten days' notice, subject to refund if found not to be in compliance with this order.

3. For good cause shown, the requirement of newspaper publication of the tariff amendments is waived.

4. Judgment is reserved as to the matter of possible refunds with respect to temporary switching rates.

5. Parties wishing to comment on the matters set by this order for further comment (i.e. possible geographic deaveraging of interoffice transport rates and possible modification of the unbundled CLEC reciprocal compensation charge) shall submit fifteen copies of their comments to the Secretary within 30 days of the date of this order.

6. This proceeding is continued.

By the Commission

(SIGNED)

JANET HAND DEIXLER  
Secretary

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